Supreme Court, U.S.
FILED
MAY 14 1991
OFFICE OF THE CLERK

No. 90-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MATTHEW J. DUYCK,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

DAVID J. GILMARTIN
Attorney for Respondent
Office and P.O. Address
320 Hampton Road
P.O. Box 5071
Southampton, New York 11969-5071
(516) 283-0200

Dated: May 6, 1991

QUESTION PRESENTED

DOES THE UNITED STATES CONSTITUTION GUARANTEE A PERSONAL RIGHT TO EXPOSE ONE'S BREASTS ON A PUBLIC STREET?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
POINT I	
THE UNITED STATES CONSTITUTION DOES NOT GUARANTEE A RIGHT TO EXPOSE ONE'S BREASTS IN PUBLIC	3
POINT II	
PETITIONER, IN FACT, ASSERTS A PERSONAL RIGHT TO PARTIALLY UNDRESS IN PUBLIC	5
POINT III	
THE MATTER OF LEGISLATIVE INTENT AND PURPOSE WAS NOT PRESERVED FOR REVIEW IN THIS CASE	6
POINT IV	
THERE IS NO CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS IN *DEWEESE* AND THE NEW YORK COURT OF APPEALS IN *O'GORMAN*	7

Page

POINT V

THERE ARE NO "SPECIAL OR IMPORTANT REASONS" FOR GRANTING THE WITHIN PETITION 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

TABLE OF STATUTES

Southampton Village Code Section 82-14 1

TABLE OF CASES

Kelly v. Johnson, 425 U.S. 238 ..... *passim*

Karr v. Schmidt, 460 F. 2d 609 (5th Cir.), Cert. denied 409 U.S. 989 ..... *passim*

DeWeese v. Town of Palm Beach, 812 F. 2d 1364 ..... *passim*

People v. O'Gorman, 274 NY 284 (1937) ..... *passim*

STATEMENT OF THE CASE

Petitioner Matthew J. Duyck removed his shirt while on a public street of the Village of Southampton. He thereby uncovered his upper body, including his breasts.

The Southampton Village Code provides, in pertinent part, at Section 82-14, "No person shall appear in a public street of said Village clothed or costumed in such a manner that the portion of his or her breast below the top of the areola is not covered with a fully opaque covering".

Petitioner is a male. The prohibition is gender-neutral.

Petitioner's removal of his shirt to expose his breasts was done in order to assure his arrest and then to challenge the law as unconstitutional.

No fact-finding hearing was held. Petitioner admitted doing the proscribed act.

Since Petitioner claimed that the law was unconstitutional on its face, no evidence was taken as to the reasons for its adoption; nor what municipal purpose it serves.

SUMMARY OF ARGUMENT

There is no constitutionally protected right to expose one's breasts on a public street. Therefore, the law requiring covering of the breasts while on the street does not deprive one of a right or personal liberty interest.

Petitioner's argument, that the case involves a right to choose his personal dress, is off the mark. The law in question, and Petitioner's conduct, is about being undressed on a public street, not choosing a form of dress.

Unlike *Kelly v. Johnson*, 425 U.S. 238, *DeWeese v. Town of Palm Beach*, 812 F. 2d 1365 and *Karr v. Schmidt*, 460 F. 2d 609 (5th Cir.), cert. denied 409 U.S. 989; there is no record in this case of the municipal intent in enacting the subject legislation.

There is no real conflict between the New York Court of Appeals decision in *People v. O'Gorman*, 274 NY 284 (1937) and the *DeWeese* case; they were decided on different bases.

Therefore, certiorari should be denied.

POINT I

THE UNITED STATES CONSTITUTION DOES NOT GUARANTEE A RIGHT TO EXPOSE ONE'S BREASTS IN PUBLIC

This Court stated, in *Kelly v. Johnson*, at page 244 of 425 U.S. 238, "But whether the citizenry at large has some sort of 'liberty interest' within the Fourteenth Amendment in matters of personal appearance is a question on which this Court's cases offer little, if any, guidance". This Court assumed, for purposes of deciding that case, that such a right existed. Nevertheless, the Court upheld the right of a police commissioner to establish rules and norms for grooming and personal appearance of police officers.

The rationale of the decision was that police officers were to be treated differently from the public at large. The Court specifically declined to hold, in that case, that there exists some right in the "citizenry at large" in matters of personal appearance.

In *Karr v. Schmidt*, 460 F. 2d 609 (5th Cir.), cert. denied 409 U.S. 989, the Court dealt with a high school's regulation of length of boys hair. The District Court enjoined enforcement of the regulation; but the Court of Appeals reversed and allowed enforcement. This Court declined to review the Court of Appeals.

The Court of Appeals noted ". . . neither the Constitution nor the Federal Judiciary it created were conceived to be keepers of the national conscience in every matter great and small. The regulations which impinge on our daily affairs are legion". 460 F. 2d 609 at 618. This Court denied certiorari (409 U.S. 989).

People v. O'Gorman was a case in which the New York Court of Appeals reversed judgments of conviction and ordered dismissal of criminal charges. The Defendants were charged with violation of an ordinance of the City of Yonkers which required that "no person over the age of sixteen (16) years shall be permitted to appear in bathing costume or in any other than

customary street attire upon any public street or thoroughfare in the City of Yonkers". The Court held that the ordinance was unconstitutionally vague. That case dealt with types of clothing, not nakedness or partial nakedness.

DeWeese v. Town of Palm Beach presented an entirely separate issue. The ordinance in question is set forth fully in the decision of the Court at 812 F. 2d 1365. As the decision indicates, this case was the culmination of extensive litigation between Mr. DeWeese and the Town of Palm Beach.

Petitioner urges that this case represents a holding that one has a fundamental right to choose his own clothing. The Court in *DeWeese* pointed out in footnote 4 at page 1366, "however, that argument is foreclosed by *Kelly v. Johnson* (citations) and *Karr v. Schmidt* (citations)".

The *DeWeese* Court went through an exhaustive analysis of the statute itself, including its statement of legislative purposes and intent, and based its ultimate decision thereon. The Court stated at page 1366 of 812 F. 2d, "Because we agree that the Town's ordinance is not rationally related to any legitimate interest, we reverse the District Court". The Court did not establish that *DeWeese* had a right to jog topless; only that the statute prohibiting it did not pass muster (for reasons unrelated to toplessness).

The cases cited by Petitioner fail to substantiate his claim that barechestedness is a constitutional right which exists and has been upheld by the Courts.

POINT II

PETITIONER, IN FACT, ASSERTS A PERSONAL RIGHT TO PARTIALLY UNDRESS IN PUBLIC

Except for *DeWeese*, the cases cited by Petitioner deal with the matter of dress. *DeWeese* concerns a jogger, a person engaging in athletic activity. The distinction between *DeWeese* and the case at bar is as clear as the distinction made by this Court in *Kelly v. Johnson*.

The Court in *DeWeese* found no rational basis *in the statute* for prohibiting men from jogging topless. This Court found a legitimate reason for regulating the personal appearance of police officers in the *Kelly* case. The two cases do not deal with the "citizenry at large".

Choice of clothing is not the issue here. Petitioner urges nothing more or less than a right to walk barechested on the public streets; and claims such a right exists in the citizenry at large. If such a right exists, we must assume that Petitioner claims such a right for both males and females. No case so holding has been found in any federal or state Court.

POINT III

THE MATTER OF LEGISLATIVE INTENT AND PURPOSE WAS NOT PRESERVED FOR REVIEW IN THIS CASE

In the *Kelly*, *DeWeese* and *Karr* cases, the Courts conducted hearings regarding the legislative purpose and intent of the statutes in question. Such did not occur in this case. Here, the initial claim in the trial Court is that the statute is unconstitutional *on its face*. Petitioner does not and did not claim unconstitutionality *as applied*.

It is respectfully submitted that this distinction separates this case from the others.

POINT IV

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS IN *DEWEESE* AND THE NEW YORK COURT OF APPEALS IN *O'GORMAN*

The New York Court of Appeals in the *O'Gorman* case was dealing with a statute which was clearly overbroad and vague. Such was not the case in either *DeWeese* or the subject case. In fact, the Court in *DeWeese* specifically rejected the argument that the ordinance was unconstitutionally vague. (See footnote 4 at page 1366 of 812 F. 2d 1365).

Upon review of the two decisions, it is clear that there is no conflict between them for the simple reason that they were decided on entirely different bases. Therefore, Petitioner may not rely upon such a conflict as a basis for certiorari (Rule 10[1][a]).

POINT V

THERE ARE NO "SPECIAL OR IMPORTANT REASONS" FOR GRANTING THE WITHIN PETITION

This is whimsical and frivilous litigation. Petitioner asserts a right to appear on a public street without a covering on his breasts. If, indeed, this Court stoops to concern itself with a matter so slight and determines that such a federal right exists, Equal Protection will require that not only Mr. Duyck but all others, male and female, of all sizes, shapes and physical conditions have a similar right.

As Chief Judge Crane, writing for the New York Court of Appeals in *People v. O'Gorman*, 274 NY 284, stated at page 286,

> "Indecency on the street of course may be restrained; if people like to walk around naked, they must stay in the house and not appear on the streets. Tastes may differ but we are all agreed on this. When it comes to the kind and sufficiency of clothes one must wear to appear decently in public, we of the law have generally left such matter to the good sense and force of public opinion. The law of the proper thing to do is not written in a book but rules most of our living. To meet the cases of persons who insist upon being conspicuous by exposing too much of their anatomy, it may be reasonable to prescribe that men and women shall cover themselves, at least when on the street".

It is inconceivable that the framers of our Constitution would have thought that it would be used to support an argument that the citizenry at large has a right to walk the streets bare-chested.

If this Court were to accept this case and decide that such a right exists, it would perforce establish a right to appear barechested or however else an individual desires; in the courtrooms, churches, and other places where the citizenry at large congregates.

CONCLUSION

The Petition should be denied.

DATED: Southampton, New York
May 14, 1991

Respectfully submitted,

DAVID J. GILMARTIN
Attorney for Respondent
Office and P.O. Address
320 Hampton Road
P.O. Box 5071
Southampton, NY 11969-5071
Tel.: (516) 283-0200